despite the language and legislative history of Section 253 that shows Congress' conscious intent to avoid pre-empting the local governments' authority and property rights. The district court misconceived the nature of the pre-emptive problem before it. (JA 305-306) Where Congress has enacted "provision[s] defining the pre-emptive reach of a statute" – here Sections 253(c) and 601(c)(1), 47 U.S.C. § 152 nt – "matters beyond that reach are not pre-empted." Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992).

The pre-emptive construction of the statute ultimately adopted by the district court is an unfavored one, because it raises serious Constitutional questions under the Fifth Amendment, the Tenth Amendment, and the Guaranty Clause, and is based on a "clear statement" by the Congress quite opposite of any intent to pre-empt a historically local function. See, English v. General Electric, 496 U.S. 72, 79 (1990).

A. The Court's Findings that the Ordinance on its Face Has a "Prohibitive Effect" is Based on a Plain Misreading of Section 253.

Because Bell Atlantic's challenge is a facial one, the County is entitled to the legislative presumption; a facial challenge must read the ordinance in a manner that no method of enforcement of the ordinance can comply with the federal statute, and Congress must preempt by "clear statement."

Thus, in assessing the reach of the intended pre-emption of state laws that "may prohibit" entry, the Court must construe the pre-emption narrowly, i.e., to pre-empt, e.g., only those franchise requirements, and terms and conditions, which at least arguably cannot be complied with, or are plainly exclusionary, and thus are in fact prohibitive. The Court's construction here, equating prohibitive with burdensome, is a subjective judicial creation-vague, uncertain, and unworkable. As revealed by the district court's inability to save any portion of the County ordinance, the broad pre-emptive construction adopted by the court is utterly destructive of the managerial authority Congress vested in local governments.

The District Judge's "belief" that the County's ordinance had an impermissibly prohibitory effect rests on an analysis that misconstrues the language and structure of Section 253. (JA 309) The district court's analysis failed to recognize that the function of subsection (c) is to totally exclude the elements of right-of-way management and compensation for use of public rights-of-way from the preemptive effect of subsection (a). In addition, the court's analysis failed to accord full meaning to the statutory term, "prohibitory effect." By using "prohibitory," Congress intended to place the burden on the Plaintiff to demonstrate something more than inconvenience, increased cost, or inequality. "Prohibit or have the effect of prohibiting" means to ban or have the effect of banning. In other words, the matter complained of must exclude the complainant from the market. Plaintiff here did not even attempt such an evidentiary showing. Certainly the Plaintiff Company is not barred from entry; it's the incumbent, dominant telephone company in Prince George's County! It is difficult to explain, let alone refute the standard of belief the District Judge applied in speculating from the face of the statute on its prohibitory impact.

Before applying the pre-emptive provisions of Section 253(a) to the County's ordinance, the District Judge failed to exclude from pre-emption that local authority unequivocably preserved in subsection (c) — the right to manage and the right to receive compensation for value of the right-of-way. This misconstruction resulted in the decision's over-pre-empting the County's ordinance under subsection (a). The misconstruction was particularly prejudicial here, where the court found only that a multiplicity of provisions had a cumulatively prohibitory effect and not that any one provision standing alone had a prohibitory effect. (JA 310-11)

1. The Decision Fails to Give Effect to the Safe Harbor Provision of Subsection (c).

Subsection (c) of Section 253 is a limitation on the pre-emptive scope of subsection (a). Subsection (c) says that "Nothing in this section [253] affects" local authority to manage the public rights-of-way and to obtain fair and reasonable compensation for their use. Subsection (c) is a Congressional direction on how Section 253 is to be construed in the courts. Literally, subsection (c) excludes from the pre-emptive effect of the phrase "no … local statute or regulation, or other … legal requirement" in subsection (a) any local action in the exercise of the governmental unit's authority to manage, or to receive compensation for the use of, the rights-of-way. Subsection (c) absolutely and unqualifiedly bars pre-emption of any local legal requirement within the scope of the subsection.

Textually there can be no doubt that "compensation … for use" is removed from preemption under subsection (a), whether it would otherwise have a prohibitory effect or not. Congress' use of the phrase "local legal *requirement*" in subsection (a) and Congress' corresponding use of the term "require" in subsection (c) excludes "compensation … for use" from subsection (a). Properly construed in accordance with Congress' instruction in subsection (c), subsection (a) doesn't deal with "require[ment for] fair and reasonable compensation … for use" at all. That matter is "read out" of subsection (a) entirely.

2. *The Court's Reliance on Cumulative Prohibitive Effect under Subsection (a) Improperly Includes Effects Excluded from Subsection (a) by Subsection (c).*

Legal requirements that are "saved" by subsection (c) cannot have an impermissible prohibitory effect ascribed to them under subsection (a). But that is not how the District Judge proceeded. It is obvious from the structure and text of the opinion that the court considered the prohibitory effect of various provisions of the ordinance under subsection (a) *before* it considered whether those provisions were even within subsection (a): "Having determined that the County's telecommunications franchise law violates section 253(a) of the FTA, the *next* question is whether it nonetheless falls within the "safe harbor" provision of section 253(c)." (JA 311) [emphasis supplied; footnote omitted])

The opinion identifies in the first two-and-a-half pages under Point II five provisions of the ordinance that "individually, may or may not" have a prohibitory effect but which the court "believe[d] that, in combination," "create[d] a unlawful barrier to entry."[10] (JA 309-11)

Only then did the opinion proceed to "the *next* question" of whether the

[10] These five provisions, e.g., the requirements for a franchise and a franchise application, are discussed in detail under Point II of this brief.

ordinance "nonetheless falls within the 'safe harbor'...." (JA 311) The court's analysis cannot be squared with the command and function of subsection (c), which directs *how* the entire section, including subsection (a), is to be read ("Nothing in this section affects...."). Section 253 is so structured that subsection (a) cannot be read until subsection (c) has been given effect. The court's analytical error is most acute with respect to the first of the provisions that it found to have a cumulative prohibitory effect, viz.:

> First, the ordinance prohibits any company from using the County's public rights-of-way to provide telecommunications services without first obtaining a "franchise" from the County. See Sec. 5A-151.

(JA 310, citing JA 69) Four pages later, however, the memorandum says:

> The County certainly is permitted under the FTA to require telecommunications companies interested in using the County's public rights-of-way to obtain a County-issued franchise.

(JA 314)

Logically, then, if the franchising requirement falls within the subsection (c) savings clause, it does not fall within the subsection (a) pre-emption clause. The court was dubitante on whether any of these requirements individually had an impermissibly prohibitory effect and disclaimed making any finding that any one of the five sections standing alone had such an effect. Any one requirement standing alone "might or might not" have a prohibitory effect. (JA 310-11) The elimination of Section 5A-151 from the cumulation invalidates the opinion's only conclusion that the five sections cumulatively had a prohibitory effect.

3. *The Court Incorrectly Concluded that any Local Requirement that Increases a Provider's Cost of Doing Business Constitutes an "Effective Prohibition."*

The District Judge's opinion misapplied the prohibitory effect standard of Section 253(a). Section 253(a) does have a threshold above which an effect must rise before it warrants preemption. The fact that a requirement might increase a provider's cost of doing business, standing alone, does not constitute a prohibitory effect. Considered textually, in the words Congress used, Section 253, after all, is entitled "Removal of *Barriers* to Entry." Taking "barriers" and "prohibit" together suggests that an effect is not impermissible unless it rises well above a de minimis level to actually preclude entry into the relevant market. Moreover, in the context of inter-governmental relations under the Constitution, an effect preemptive of traditional state authority requires a "clear statement." Internally within the 1996 act, Congress has negated implied preemption. Section 601(c) of the 1996 act, 47 U.S.C. § 152 nt, specifically provides that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided...." Section 414 preserves rights under state law generally.

The Supreme Court has addressed another provision of the 1996 act that presents an analogous question of the threshold needed before considering an impact on competitive entry. There the Court rejected the Federal Communications Commission's gloss on the phrase "would impair the ability of the telecommunications carrier ... to provide the services that it seeks to offer" in Section 251(d)(2)(B). Addressing the Commission's impairment-of-competition standard, the Court said:

> [T]he Commission's assumption that any increase in cost (or decrease in quality) ... renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not ipso facto been "impair[ed] ... in its ability to provide the services it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary." In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with "necessity" and "impairment" might be reasonable; but it has not established the existence of such an ideal world. We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

AT&T v. Iowa Util. Bd., 119 S.Ct. 721, 735 (1999) (footnote omitted). If an "increase in cost" does not "impair" competition within the meaning of Section

251, then surely it does not "prohibit" competition within the meaning of Section 253. An increase in costs cannot properly be classified as one of the "barriers" which Congress intended to remove by Section 253 (Removal of barriers to entry).

The District Judge's objection to the County ordinance's fee structure under Section 253, had already been debated and rejected on the House floor. This very point was raised by opponents of the Barton-Stupak Amendment to subsection (c) and rejected in the vigorous floor debate between the Managers' Amendment and the Barton-Stupak Amendment. <u>See</u> Point I(B) *post.*

B. The Court's Construction of Section 253 Should be Rejected Because it Raises Constitutional Questions.

The pre-emptive construction of Section 253 should be rejected because it raises difficult constitutional questions under the Fifth and Tenth Amendments to the Constitution and the Commerce and Guaranty Clauses. It is an established canon of construction that the courts will not give a statute a construction that would raise constitutional questions unless compelled to do so. <u>Dept. of Commerce</u> v. <u>House of Representatives</u>, 119 S.Ct. 765, 779 (1999), quoting <u>Spector Motor Svc</u>. v. <u>McLaughlin</u>, 3232 U.S. 101, 105 (1944) (no more deeply rooted doctrine of constitutional adjudication). <u>See also</u> <u>Harmon</u> v. <u>Brucker</u>, 355 U.S. 579, 581 (1958), cited by the District Judge. (JA 305) As a matter of policy, this Court follows the "well-established rule that resolution of an unresolved and serious constitutional question should be avoided if a reasonable statutory interpretation would lead to a result obviating the necessity for a resolution of an issue of basic law." Johnson v. Mayor, 731 F.2d 209, 213 (4th Cir. 1984), rev'd on other gnds, 472 U.S. 353 (1985); U.S. v. Dickerson, 166 F.3d 667, 683 (4th Cir. 1999). The D.C. Circuit applied that canon in striking down the FCC's attempt to grant competitive telephone companies access to the premises of incumbent telephone companies in the name of competition. Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994). The court below has made the same error as the FCC. It has read Section 253(a) as granting telephone companies forced access to the County's property in the name of competition.

The District Judge's construction of Section 253 puts in issue two basic County interests under the Constitution, and these are the same interests that Congress recognized and sought to preserve in subsection (c), viz., the County's police power authority to manage activities in the public rights-of-way and the County's property-based constitutional right to collect "compensation ... for use" of its property. The management function is founded on the County's powers as a delegee of sovereign police powers. The right to compensation is founded on the County's control and ownership of property in the public rights-of-way. The right to compensation is one of the County's bundle of rights as owner. As a trustee for the public, the County has a fiduciary obligation to manage the valuable property in the economic interests of the beneficiary public.

Full recognition of County property rights is no more than what Congress itself contemplated in enacting Section 253. The District Judge's reading of Section 253 is simply not consistent with what Congress thought it was about, as reflected in the legislative history which the court had before it. (JA 216 at 237-239)

The language that became subsection (c) originated by amendment in both houses, but only on the House side was adoption of the amendment accompanied by illuminating controversy. Subsection (c) was first added to the Senate bill, S. 652, in committee mark-up. The amendment was sponsored by Senator Kay Bailey Hutchison (R-Tex.), who had raised in the Senate Commerce Committee's hearings the concern that Congress should protect local governments' rights. The Senator argued that local governments had to retain full power to manage and to receive compensation for telecommunications providers' use of public rights-of-way. The amendment passed the Senate without significant change in language. H.R. 1555, the House's substitute bill, was originally more pre-emptive of the local governments' interests. That bill was voted out of committee only after an undertaking by the bill's managers to negotiate a softening of federal pre-emption

– that softening to be incorporated in a so-called managers' amendment on the floor. Ultimately, the managers' amendment did not satisfy the Members who opposed pre-emption of local governments' police power and local governments' property rights. The issue was debated on the floor between the proponents of the managers' amendment and the proponents of an amendment by Congressmen Barton (R–Tex.) and Stupak (D–Mich.). The floor debates led to rejection of the managers' amendment to Section 253 and the substitution of the Barton-Stupak Amendment by a floor vote of 338-86. 141 Cong. Rec. for August 4, 1995, at H 8477 (daily ed.). During the floor debates Congressman Stupak explained the effect of his amendment:

> [I]f our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property [under the unamended bill]. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize the telecommunications companies....

Id. at H 8460. Congressman Barton confirmed the protection of both police power and property rights of the local governments in these words:

> [The amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Chairman's [Managers'] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way.

Id. As noted above, the Managers' amendment was rejected because it did not go "the entire way" in protecting local governments' property rights in and police power over the rights-of-way. Here, however, the court has placed the judiciary in precisely the position Section 253(c) was meant to avoid — telling the localities how to price rights-of-way.

Provisions like those of the County's ordinance that the court invalidated only because it saw them as inconsistent with the general competitive thrust of the 1996 act had been within the objections raised by Congressman Shaefer and others in the House debate of the bill, id. at H 8460-61. But Congressman Shaefer's position was resoundingly rejected in the House's adoption of the Barton-Stupak Amendment. The pertinent pages from the House debates are printed in the addendum to this brief. Since the amendments to Section 253(a), (b), and (c) that passed the two houses were "identical or similar,"[11] the House debates and vote stand as a considered and deliberate Congressional rejection of the assumption by the court below – and the district court decisions from Texas which the opinion cites – that the general competitive purpose of the bill required a broadly pre-emptive reading of the language of Section 253 instead of a narrowly pre-emptive reading. In finding implied pre-emption in subsection (c) by relying on generalized purpose – contrary to the teaching of Medtronic v. Lohr, 518 U.S. 470

(1996), and the instruction of Section 601(c)(1) of the 1996 act, 47 U.S.C. § 152 nt – the court reopened issues that had been conclusively settled by the Congress. Moreover, where Congress has expressly defined the scope of pre-emption, implication of pre-emption, as the court's opinion applies (JA 305-06) is foreclosed. Cippollone v. Liggett Group, supra.

The District Judge erred in striking down the gross-receipts-based franchise fee that it found did not "appear to be directly related to Bell Atlantic's actual physical use of the County's public rights-of-way..." (JA 320). The court's analysis foundered on its rejection of the County's claim to the value of the providers' use, an analysis based on an assumption that Section 253 allowed only recovery of "costs of administering their franchise programs and of maintaining and improving their public rights-of-way." (JA 318) Anything more, the court thought would "constitute an unlawful economic barrier to entry under Section 253(a)." (JA 318) The court read Congress' intent in subsection (c) as limiting the local governments to charging franchise fees that were related either to a telecommunications company's degree of physical presence in the public rights-of-ways or to a local government's costs of maintaining and improving its rights-of-way. Otherwise, "local governments could effectively thwart the FTA's pro-competition

---

[11] Conference Report to accompany S. 652, H. Rpt. 104-458 at 127 (1996).

mandate and make a nullity out of section 253(a)." "Congress," the court thought, "could not have intended such a result." (JA 318)

Fundamentally, however, this view of Section 253 deprives the County of the value of its property. (JA 321) But the court then struck down the fee provisions of the County's ordinance as not "directly related to Bell Atlantic's actual physical use of the County's public rights-of-way." (JA 320)

In this, again, the court erred. It failed to give controlling weight to the dual presumptions of avoiding constitutional questions and requiring a "clear statement" of pre-emptive intention as to core functions. The court failed in its duty to give "a narrow interpretation" to the language Congress did use in subsection (a), contrary to the Supreme Court's instruction in Medtronic v. Lohr, supra, at 485 (1996).

1. The County Has a Compensable Property Right in the Rights-of-Way.

The County's interests in its public rights-of-way are property rights protected by the Fifth Amendment from a governmental taking without payment of compensation. The County's roads are no different from the municipal landfill in U.S. v. 50 Acres of Land, 469 U.S. 24, 31 (1984), where a unanimous Court held that the reference to "private property" in the Takings Clause of the Fifth Amendment encompasses the property of local governments when it is condemned by the United States. See also U.S. v. Carmack, 329 U.S. 230, 242 (1946). There is no dispute as to the County's ownership. See, e.g., specimen deeds in fee (JA 200, 202, 207). As previously noted, P.L.Md. 1904, ch. 591, art. 17, reaffirmed the County's ownership and control "to all public roads".

The federal courts, led by the Supreme Court in City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92 (1893), opinion on reh'r'g, 149 U.S. 465 (1893), and recently ratified by the Fifth Circuit in City of Dallas v. FCC, 118 F.3d 393, 397 (5th Cir. 1997), recognize that local governments have the normal rights of all property owners in controlling all elements of the benefits of this property. Thus, when the County "franchises" a telecommunications operator related to some right-of-way privilege, the County is conveying a limited property interest to the "franchisee" — a personal, revocable right to use the public right-of-way, strictly limited as specified by the terms of the franchise. A franchise is a form of property conveyance, similar to but different from and more limited than a lease or sale.[12]

[12] Obviously, the County cannot convey more than it holds. The County's prior rights in its rights-of-way are wide and variable, ranging from fee interests, to dedicated easements, to holdings "in trust for the benefit of" the general public and the abutting landowners. Whatever the County holds, the franchisee receives a lesser interest, as a revocable, non-transferable interest for limited and specified purposes.

2. *Preemption of Municipal Franchising Would Effect a Taking of the County's Property Rights.*

The reading given Section 253 by the court would effect both a physical taking and a so-called categorical taking. The difference is not important here, because Congress intended neither.

Telecommunications providers placing their cables in the County's rights-of-way enjoy no less a permanent physical occupancy requiring compensation than the cable company hanging its cables from and across Mrs. Loretto's apartment building in Loretto v. TelePrompTer Manhattan, 458 U.S. 420 (1982), and providers placing their switching equipment in the Plaintiff Company's central offices in Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994). The question has actually been decided as to streets by the U.S. Supreme Court in City of St. Louis v. Western Un. Tel. Co., supra, where the Court held that the City was entitled to rent as a demand of proprietorship. Id., 148 U.S. at 97; accord, City of Dallas v. FCC, supra.

Section 253(c) allows the County to recover "fair and reasonable compensation ... for use of public rights-of-way" from the telecommunications companies. The District Judge construes this provision to limit the County to receipt of a franchise fee "reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way." (JA 318). But "cost recovery" is not the measure under the Fifth Amendment. Whatever value a court might ultimately settle upon under this calculus, it obviously understates the appropriate compensation for the loss of the "economically beneficial or productive use of land." Front Royal Industrial Park Corp. v. Town of Front Royal, 135 F.3d 275, 285 (4th Cir. 1998). Compensation for loss of the value of the property over its cost eludes the court's measure. The Fifth Amendment protects far more than just real property. Eastern Enterprises v. Apfel, 118 S.Ct. 2131, 2146 (1998) (liability for miners' pensions).

3. *Congress Meant to Include Compensation Based on Value within "Fair and Reasonable Compensation for Use" of Public Rights-of-Way.*

Section 253 can be read in a manner consistent with the intentions of Congress and good public policy, without infringing on Fifth Amendment concerns, by allowing recovery of full market value. Any other reading effects a taking of the County's property, whether held in fee or in trust for others or otherwise controlled.

The district court ignored this point and concluded instead that "costs" of the County are the only relevant factor to arrive at compensation. The court chose to follow the mistaken analysis of Dallas[13] and Austin,[14] rather than the established approach used in Dearborn.[15] For whatever reason, the Dallas and Austin courts saw the relationship between the local government and the telecommunications company as based in regulation and not in property rights conveyed.[16] If property rights were not at issue, it would be understandable that the courts might look to the regulatory costs of the cities, expressing these as the additional costs created by the construction activities of the companies. On the other hand, in Dearborn, the court recognized the multi-faceted relationship between the local government and the company. The local government did intend to regulate and control the construction activity in the rights-of-way and did intend to compel the telecommunications providers to pay any costs caused to the city or abutting land owners. Like Austin and Dallas, Dearborn found each of these goals appropriate and sustainable under Section 253(c). But the Dearborn court went on to recognize an additional, and separate. interest that was at issue between the companies and the local government. The City of Dearborn, through its franchise, was conveying

---

13 AT&T v. City of Dallas, 8 F.Supp. 2d 582 (N.D. Tex. 1998).

14 AT&T v. City of Austin, 975 F. Supp. 928 (W.D. Tex. 1997).

15 TCG v. City of Dearborn, 16 F.Supp. 2d 785 (E.D. Mich. 1998).

16 The Dallas and Austin decisions do not cite the controlling precedent in the Fifth Circuit that holds that local governments do hold valuable property rights in the form of public rights-of-way and the federal government cannot constitutionally "compel access" to those rights-of-way or otherwise ignore local governments' right to negotiate a fairly valued franchise for use of the streets. See City of Dallas supra.

a valuable right of access and use of the public's property, which warranted additional compensation based on the value conveyed.

Congress could not have intended a different result in Section 253(c). Aside from the extensive, and explicit legislative history that endorses valuation based pricing for franchise rights conveyed, the Congress was silent on the issue it had to address if it intended a taking of local government property. Congress created no authorization or appropriation of federal funds to compensate local governments for a federal taking of the value that is otherwise conveyed through right-of-way franchises. Congress did not indicate it thought its actions constituted a taking or that the federal government should be prepared to pay the bill for the transfer of the value of the rights of way from local taxpayers to private telecommunications companies. The negative implication is unavoidable. Congress must have intended that the telecommunications companies keep the taxpayers whole and pay the appropriate amount for the value of the rights-of-way received through rights-of-way franchises. Despite this the district court instead proceeded from a presumption that Congress did not intend the operators to pay for the value taken, creating the constitutional problem of a taking of the local taxpayers' property which only the federal government can recompense. [17]

Section 253 cannot reasonably be read as authorizing a taking of thirty-six thousand local governments' rights-of-way which would warrant compensation to be awarded in the Court of Claims. Cf. Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 134-36, 148-50 (1974) (Regional Rail Reorganization Act cases). As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on the Federal Communications Commission's regulatees. Indeed, even in the former Post Roads Act,[18] Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 101 (1893), opinion on reh'r'g 149

[17] This approach stands in stark contrast to Congress's explicit endorsement of the FCC's auctioning off the federal rights-of-way in the form of electromagnetic spectrum frequencies. The spectrum auctions, as the FCC states publicly, were carefully designed to force the companies to pay "full value" for the use of the frequencies. See Section 309(j)(3) of the Communications Act, as amended, 47 U.S.C. § 309(j)(3). Yet no one argues that a cellular company's use of frequencies imposes additional costs on the federal government comparable to the $40 billion raised to date through the auction process.

[18] In the former Post Roads Act of 1866, 14 Stat. 221, Congress extended to state-chartered telegraph companies the same authority to use public lands as had been granted the federally chartered Pacific railroads and their telegraph affiliates over the alternate sections of public lands that were not part of their land grants. In the two opinions cited in the text above, the Supreme Court rejected the contention that 1866 Act gave Western Union the right to occupy municipally-owned land rent-free.

U.S. 465 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of post roads did not carry with it the power to take non-federal property without compensation. See Western Un. Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904), citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900).

The 1996 act contains no explicit takings authority. Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a district court under 28 U.S.C. § 1358.

The lack of explicit statutory authority to take private property cannot be rectified by reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. The Anti-Deficiency Act, 31 U.S.C. § 1341, reflects a strong public policy against incurring unbudgeted expenditures. The 1996 act would certainly have been subjected to a point of order under the Budget Act if Congress had intended that the local governments be compensated under a takings standard from the U.S. Treasury. These circumstances fairly compel the conclusion that Congress did not intend to incur any financial liability under the Tucker Act by enacting Section 253.

Under whatever theory, it is equally clear that Congress did not intend to shift the financial loss to the local governments. In the debate on the Barton-Stupak Amendment on the House floor, the potential applicability of the Unfunded Mandates Act, 2 U.S.C. § 1501 et seq., was raised. Remarks of Mr. Stupak, 141 Cong. Rec., August 4, 1995, at H 8460 (daily ed.). Had the Barton-Stupak Amendment not been substituted for the Managers' Amendment, so that Section 253 would have imposed a financial loss on the local governments, the Unfunded Mandates Act would have been invoked. The Barton-Stupak Amendment was intended to avoid, in the words of the co-author of the language finally adopted, a hundred- billion-dollar unfunded mandate. Remarks of Congressman Stupak. Id. at H 8460. Read the way the district court would read it, the bill that became the 1996 act would have been subject to a point of order under Section 2(6) of the Unfunded Mandates Act, 2 U.S.C. § 1501 et seq. Thus, it is equally proper to infer from the absence of such a point of order that the House, by adopting Barton-Stupak, dodged the unfunded mandate bullet by not depriving the local governments of revenues from their rights-of-way properties.

Seldom does a legislative history rebut so conclusively the court's atextual reading of the statutory language. Here, all of the objections to the literal reading of subsection (c) advanced by the District Judge were also advanced in the debate on the House floor over the very words which became subsection (c). It is clear that the statutory language was intended to permit the cities the very latitude in setting fees that the District Judge objected to. It is equally clear that Congress, rightly or wrongly, intended the supposed effect which the court and the legislative opponents found inconsistent with the general purpose of the bill. Whether, in this, Congress was right or wrong, consistent or inconsistent, is not a proper question for the judiciary. In the end, the specific legislative intent controls any general intent.

4. The Parties to the Franchise, not the District Court, Determine the Interests Conveyed, the Value of those Interests, and the Form and Amount of Compensation.

A franchise can convey any of an infinite variety of underlying property interests. For example, an open-ended right to enter any County right-of-way at any time over a fifteen year period is quite different than a right to trench across a single street to connect two specific buildings. Similarly, a company may seek only "transitting" rights, passing through the county on a single road with no intention of offering service within the county. The list goes on.

Justice Scalia recently addressed the wide range of public property interests that may be compensable. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072 n. 7 (1992), he suggests that the "interests" cognizable for Fifth Amendment purposes "may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." In other words, if the access or use of public property sought by the telecommunications company were cognizable when requested from a private property owner, then it should be comparably valued and enforceable in a public property context.

A telecommunications company needs a number of rights and authorities to operate a telephone system. The grant of one (for example, a certificate of convenience and necessity from the state PSC) does not imply the grant of others (for example the right to use a private railroad right-of-way). It is for the marketplace to determine when the operator is best served by direct negotiations for rights of use of private property or rights to use public rights-of-way or rights of use of federally controlled electromagnetic spectrum for wireless. In none of these examples is the "cost of occupancy" the sole criteria for valuation.

Again, the district court jumped to an unnecessary and unconstitutional conclusion in disallowing compensation for use of the rights-of-way by non-facilities-based resellers. The Court refused to allow the County to receive compensation from companies that used the facilities constructed by others. The correct answer is that the source of compensation may be from the physical occupant and/or any users exploiting the use through the occupant. This is simply a matter of allocating the fair-value-compensation among all beneficiaries of the property interest on some reasonable basis. Whether the liability to pay the compensation to which the county is entitled is assigned solely to the physical occupant (who will undoubtedly pass it through to the users), or to the actual users directly, or through credits to the facilities-based provider for direct payment from resellers is merely a matter of administrative convenience and fairness.

The Prince George's judge expanded on the Texas courts' errors of concluding that physical occupancy was required to justify the "rent" and the "rent" had to be related to the actual amount of physical occupancy that occurred. The court missed the basic property law point. If the compensible franchise right is a "right to use," then compensation flows whether or not there is actual use, let alone physical occupancy. The parties might well negotiate fee based on a percentage of the overall business revenues, especially if the franchisee wants the discretion to build in the rights-of-way throughout the county over time. The gross receipts will grow as the provider's network expands, and the County may properly consider gross receipts as a proxy for use.

5. *A Gross-Receipts-Based Fee is a Fair and Reasonable Measure of the Value of the County's Rights-of-Way.*

The phrase "fair and reasonable compensation ...for use" in subsection (c) limits the level of the charge that the County can make within the safe harbor, and anything in excess of "fair and reasonable" becomes subject to the "prohibitory effect" test of subsection (a). The phrase "fair and reasonable" is not defined by statute. TCG v. City of Dearborn, 16 F.Supp.2d 785, 789 (E.D. Mich. 1998), cross-appeals pending, 6th Cir. Nos. 98-2034 and 98-2035. The legislative history *post* shows a dominant intention on the part of the Congress to give the local governments great latitude as to charges. Point II(ii) of the court's opinion does not seem to conclude that three percent of net gross receipts in the County's ordinance is too high, i.e., unfair or unreasonable in amount. Indeed, without evidence of the business plans of the various providers, the court would have no way of gauging the prohibitive effect of the County's charge, taking into account the generous exclusions for revenues from basic telephone service in Section 5A-150(a)(9) (definition of gross revenues). (JA 67) Rather, the court struck down the fee because it considered the base to be improper. Thus, this Court cannot decide on this record that the resulting level of ~~the charge~~ in CB98-1998 is not "fair and reasonable" or has a prohibitive effect.

The gross-receipts base of the fee is within Congress' contemplation. In adopting the Barton-Stupak Amendment on a roll-call vote of 338-86, it is apparent that the members of the House were consciously voting for language that would validate gross-receipts-based franchise fees. During the debate on the rule under which the committee bill was to be brought to the House floor, the manager for the bill, Congressman Bliley (R-Va.), a former Mayor of Richmond and a former president of the Virginia Municipal League, assured the members, in answer to a question from Congressman Goss (R-Fla.), also a former mayor, that even the Managers' Amendment allowed

> the councils ... and the mayor [to] make any charge they want provided they do not charge the cable company one fee and they charge a telephone company a lower fee for the same right-of-way. They should not discriminate, and that is all we say. Charge what you will, but ... do not discriminate in favor of one or the other.

Id. at H 8274. Bearing in mind that franchise fees for cable companies were expected to be on a gross-receipts basis, limited to five percent of gross revenues under Section 622(b) of the Cable Act, 47 U.S.C. § 542(b), it is apparent from the colloquy that the members expected the franchise fees on telecommunications providers to be on a comparable basis, i.e., a percentage of gross revenues. When the Barton-Stupak Amendment was on the floor of the House two days later, both the proponents argued competitive effect in gross-receipts-based terms. Mr. Schaefer (R-Col.) attacked the Barton-Stupak Amendment on the ground that it would allow "8 percent of the gross, the gross, of the [providers] who are coming in," and argued that unless his amendment were adopted providers in one city would be "assessed up to 11 percent of gross revenues as a condition for doing business there." Eleven percent, he argued, had nothing to do with "control of right-of-way". Mr. Bliley opposed the Barton-Stupak Amendment to the committee bill on the grounds that the Barton-Stupak Amendment allowed the municipalities to charge the telecommunications providers more than the cable operators. 141 Cong. Rec. for August 4, 1995 at H 8460-61 (daily edition). Thus, Judge Blake's objections to a gross-revenues-based franchise fee had been raised and were rejected in the 338-86 vote adopting the Barton-Stupak Amendment. Id. at H 8477.

The legislative history was before the District Judge. (JA 239) In that history the House considered and rejected the objection to the Barton-Stupak Amendment that the amendment would allow the obstruction of entry by its not limiting telecom franchise fees. The vote clearly rejected Congressman Fields' objections that

> When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of rights-of-way, that fee becomes a cost

> of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive.
>
> * * *
>
> What does control of rights-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.
>
> Such large gross revenue assessments bear no relation to the cost of using a right-of-way and clearly are arbitrary. It seems clear that the cities are really looking for new sources of revenue....

Id. at H 8461.

The proponents, on the other hand, made it clear that the intent of their amendment was to make sure that the cities were fairly compensated for the use of public property, in which they invested $ 100 billion a year. The intent was that they be compensated at the free-market rate. Remarks of Mr. Stupak, id. at H 8460. The House was urged by Mr. Barton to vote for his amendment on the grounds that it went "the entire way" in rejecting any kind of Federal price controls over franchise fees. Id.

Contrary to the reasoning of the opinion, the County's gross-receipts-based fee yields compensation proportionate to the providers' use of the rights-of-way. What the court misapprehended in invalidating the fee provisions of the ordinance as not related to the providers' "degree of use" of the rights-of-way (JA 321) is that gross receipts are a reasonable proxy for intensity of use. The providers' use of the rights-of-way is to carry voice and data from one place to another -- that's the business of a telecommunications common carrier. The Council could reasonably use gross receipts as a measure of the amount of "information" being carried by the carriers through the rights-of-way -- the number of bytes being "pumped" through the rights-of-way, if you will. This measure is not different in principle from the railroads charging by the pound, whether it be for freight carried in their boxcars or in a trucking company's trailers loaded on a flat car.

The productivity or "use" of the railway line is measurable in terms of net tons of freight transported. So also the use of the County's rights-of-way to carry communications is measurable in quantity of communications. "Use" is functionally different than "occupancy." What the court below and the Texas district courts overlooked is that Congress used the term "use" and not the term "occupancy."

As to "effect," of course, a right-of-way charge based on percentage of gross revenues favors developing competition and the entry of Bell Atlantic's competitors. During start-up when cash flow is low, a new company's franchise fee expense is proportionally low. Most start-ups would like to have all their landlords charge rent during the early years capped by a percentage of gross revenues. Clearly, a gross-revenues-based fee is in fact not a barrier to entry of competitors within the intendment of Section 253 (Removal of Barriers to Entry).

6. *Congress Cannot Constitutionally Preempt Municipal Franchising under the Tenth Amendment and the Guaranty and Commerce Clauses.*

As construed by the District Judge, Section 253(a) exceeds the powers of Congress under the Commerce Clause and violates the Tenth Amendment and the Guaranty Clause. It conscripts lawfully constituted local officials and duly elected members of the County Councils as functionaries in a federal program of forced access of for-profit entities into the public rights-of-way managed by the local entities.

Section 253 is not a case of simple displacement of local authority and the substitution of federal authority. That would present a different constitutional issue. Given the large number of competitive telephone companies that seek access to public rights-of-way in lucrative markets, Congress could not achieve its objective of open entry by total preemption of local right-of-way management. Utter chaos would result as competing providers – trenching cables and burying conduits in the street – severed competitors' facilities accidentally or maliciously and, in some cases, emplaced their facilities so as to physically foreclose their competitors' entry into the market, much as the B&O Railroad attempted to foreclose the westward expansion of the C&O Canal in the late 1820's and the Rio Grande Railroad foreclosed the Santa Fe Railway's line through the Royal Gorge in 1870's.[19] With 36,000 local jurisdictions, Congress could not give the local governments the option of participating or not in the management of their rights-of-way, as Congress did in the case of the regulation of pole attachment rates in Section 224(c) of the Communications Act, 47 U.S.C. § 224(c), or in the strip-mining restoration program in Hodel v. Virginia Surface Mining Ass'n., 452 U.S. 264 (1981).

Congress was stuck here, just as it was in Printz v. U.S., 117 S.Ct. 2365, and New York v. U.S., 505 U.S. 144 (1992). The program wouldn't work without the aid of the local officials. Congress' decision to leave state and local control of the public rights-of-way in place is memorialized in subsection (c), which preserves local authority over the management of public rights-of-way.

The Commerce Clause authorizes Congress to regulate interstate commerce, but "Congress is constrained in the exercise of that power by the Tenth Amendment." Condon v. Reno, 155 F.3d 453, 456, 458 (4th Cir. 1998), cert. gr., 119 S.Ct. 1753 (1999). As a result, when exercising its Commerce Clause power, Congress may only "subject state governments to generally applicable laws." New York v. U.S., supra, at 160, i.e., only "incidentally." Garcia v. San Antonio Met.

---

19 See Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R.R., 4 G.&.J. 1 (Md. 1832); Denver & Rio Grande Ry. v. Canon City & San Juan Ry., 9 Otto (99 U.S.) 463 (1878).

Transit Auth., 469 U.S. 528, 556 (1985). See also Printz v. U.S., 117 S.Ct. 2365 (1997). Section 253 is not such a "generally applicable law." Only governments have public rights-of-way, and textually subsection (a) addresses only "legal requirements." There is no non-governmental analog. The District Judge's construction of Section 253 attributes to Congress, as in Condon, supra, an intent to subject the states not to a generally applicable law but "specifically to regulate the States' control of their property." Id. at 462. Congress might have attempted to impose provider access on the local governments by conditioning federal highway funds, cf. South Dakota v. Dole, 483 U.S. 203 (1987), but it did not do so.

What Congress may not do – although it is the result that the District Judge's construction would produce – is enact any law that would direct the functioning the States' executives or legislatures. New York v. U.S., 505 U.S. 144, 188 (1992); Printz, supra, at 2377. For purposes of distinction between states, qua states, and their political subdivisions "is of no relevance." Printz, supra, at 2394 n. 15

The District Judge's reading of Section 253 acknowledges that the County is allowed under Section 253(c) to manage public rights-of-way, and the opinion concludes that the County "certainly is permitted" to require telecommunications companies to obtain county-issued franchises. (JA 314) But the court proceeds to construe that provision – without textual support – to preempt the County from requiring basic financial information showing financial responsibility, to preempt the County from setting the terms and conditions of the grant of a franchise, etc. In plain terms, Section 253, as construed by the district court, would require the County to grant franchises of County property without reference to state or local authority and considerations. To compel the County to so administer the federal regulatory program would be plainly incompatible with our system of "dual sovereignty." Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). The District Judge seems to have read Section 253 as extinguishing all existing sovereign authority and making the local governments' acts with respect to their rights-of-way effectively dependent on a delegation of authority from the federal government in subsection (c). This is not what Congress said in subsection (c) and not even a power that Congress has to delegate. With exceptions, of which the Commerce Clause is not one, the Constitution "confers upon Congress the power to regulate individuals, not States." New York v. U.S., supra, at 165, quoted with approval in Printz, supra, at 2377. By enacting Section 253 Congress has not attempted to regulate property owners generally, only state and local governments.

Practically speaking, the court's reading would require County officials to "recommend" and the County Council to "approve" franchise terms and conditions ostensibly dictated by the federal statute as interpreted by the federal judiciary. But

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York v. U.S., supra, at 178; id. at 161; Hodel, supra, at 288 ("commandeer the legislative processes"); Printz, supra, at 2371.

Forcing the County's officials and legislators to act in their official capacities, as the District Judge's interpretation of Section 253 necessitates, deprives the citizenry of the right to a Republican form of government. This is a right guaranteed to them by Guaranty Clause of the Constitution, Article IV, Section 4, in return for their relinquishment of the natural right to rebel against despotism.[20] To require a local officer or legislator to act officially without the authority based in state law is to deprive the citizens of the state and locality of representative government, i.e., a republican government. In re Duncan, 139 U.S. 449, 461 (1891).[21] While the Tenth Amendment is said to be complementary to

[20] See Federal Papers No. 21 (Hamilton) at 140 and No. 43 passim (Madison) (C. Rossiter ed. 1961). The point was urged upon the Court but not decided in several cases, including Taylor v. Beckham, 178 U.S. 548, 578 (1900), and Luther v. Borden, 7 How. (12 U.S.) 1, 29 (1849).

[21] The "distinctive characters of the republican form" are expostulated by James Madison, the author of the Guaranty Clause, in Federal Papers, No. 39 at 241 (C. Rossiter ed. 1961).

Congress' Article I powers, cf. New York v. U.S., supra, at 156-59; U.S. v. Darby, 312 U.S. 100, 124 (1941), the Guaranty Clause must be read in tension with Article I. As a guaranty, it must be given effect as a limitation on Congress' Article I powers, i.e., Congress may not legislate in derogation of that guaranty. Because the Congressional power imputed here is not based on Section 5 of the Fourteenth Amendment, Congress' legislative power remains subject to this fundamental guaranty.

In the end, the District Judge's reading of Section 253 is not a reasonable one, for

> if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so "unmistakably clear in the language of the statute...." Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the States.

Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). See also Feikema v. Texaco, 16 F.3d 1408, 1413 (4th Cir. 1994); DeBartolo Corp. v. Florida Gulf Coast States Trade Council, 485 U.S. 568, 575 (1988); Amos v. Maryland Dept. of Corrections, 126 F.3d 589, 594-95 (4th Cir. 1997).

II. THE MANAGEMENT PROVISIONS OF THE COUNTY's FRANCHISE ORDINANCE RESPOND APPROPRIATELY TO THE NEW PROBLEMS ARISING FROM MULTIPLE ENTRIES INTO THE PUBLIC RIGHTS-OF-WAY.

The right-of-way management provisions in the County's ordinance that the district court struck down when it enjoined the ordinance in toto were an appropriate response by the County legislature to the new situation arising in the streets and highways of the County from Congressionally mandated open entry for telecommunications providers. This in turn created multiple companies seeking entry into the County's public rights-of-way. These provisions of the ordinance, being in "a field which the States have traditionally occupied," were entitled to a presumption of non-pre-emption. Accordingly, any pre-emptive effect of Section 253(a) must be narrowly construed. For the same reason, the court should have construed subsection (c) – saving state-law-based rights – liberally, see Medtronic v. Lohr, 518 U.S. 470, 485 (1996), rather than "fairly narrow[ly.]" (JA 315) Particularly is this so in a case where the Plaintiff Company has conceded in its complaint that it is subject to the exercise of those traditional police powers. (JA 37)

Here the County was faced with a situation where no longer would there be just one monopoly provider of telephone service to be accommodated in the rights-of-way. There would be a multiplicity of providers clamoring for places in the right-of-way. As most urban commuters know, traffic congestion has become more acute as telecommunications providers trench the streets. By October, 1998, five separate and distinct telecommunications companies were constructing facilities in the County's roads and other rights-of-way. The Public Works Department had been approached by two more companies seeking authority to begin major construction. It had become clear that the County had to modify its historic approach of "blanket construction permits" and free access to public property for private companies seeking intrusive operations that would disrupt and permanently interfere with other rights-of-way activities.

The County concluded that a transition was required. Companies that continued to promise universal telephone service, under state regulated rates, would continue to enjoy free use of rights-of-way. Ordinance 98-1998, § 5A-154(c) (JA 75). But companies that wanted to use the common public property to serve only selected customers should not be subsidized by the general taxpayer. And all the companies, whether seeking general, open-ended opportunity to access the County's rights-of-way or seeking only limited, specific access to the rights-of-way for internal corporate purposes, § 5A-151(g) (JA 70-71), had to get specific authority from the County to use the County's rights-of-way. All had to comply with a new, modernized, coördinated set of applications, disclosure of building plans, permits, and regulations. These requirements identified who was doing what, where, and when in the County's rights-of-way and encouraged advance planning and coördination of construction activities. And the requirements protected the County's taxpayers from the financial consequences of sloppy construction and incompetent and fraudulent activities in the rights-of-way. The County was well aware of the risks of operator and contractor bankruptcy, abandonment, faulty construction, peripheral damage to abutting property and to co-located facilities of competitors, and injury to the interests of other rights-of-way users.

The district court, in its facial review, brushed off the County's explanation that the ordinance facilitated entry rather than prohibited it. (JA 309) The opinion below cited five specific examples of over-management:

- Franchise (§ 5A-151)
- Franchise application form and processing fee (§ 5A-152)
- Franchise approval (§ 5A-152)
- File a financial report from which the gross-receipts-based franchise fee can be calculated (§ 5A-154)
- Approval required for transfer of control of franchise to an outsider (§ 5A-156).

(JA 310)

The court reached a factual conclusion as to effect on a facial reading of each provision without benefit of testimony or affidavit from the plaintiff, or even a formal answer to the complaint by the defendant. The court failed to use the proper standard of evaluation for each in a facial challenge setting. The court should have reviewed each to determine whether there was any possible reason that would justify the requirement. And, in any event, the court should have realized that each one of these supposedly "prohibitory effects" should be excluded from pre-emption under subsection (a), because each is a reasonable exercise of the County's right-of-way management authority under its police powers and its proprietary powers as owner of the rights-of-way.

As to the franchise requirement, the opinion later concedes that "The County certainly is permitted to require ... a County-issued franchise." (JA 314).

As to the franchise application form and processing fee, the County certainly is permitted to protect itself from liability and inconvenience caused by irresponsible providers and contractors. This concern is not a hypothetical one, as the experience of the City of St. Paul demonstrated. There, lanes in 213 blocks of downtown streets were left blocked for an extended period by the providers' substitution of contractors. A copy of an article from the St. Paul Pioneer Press describing this fiasco is printed in the addendum to this brief.

As to the franchise approval, the court seemed to think this was discretionary. It is not any more discretionary than zoning, where reasonable results are assured by judicial review in the state courts. There is no reason to believe on the face of the ordinance that the County will be arbitrary.

As to periodic financial reports, § 5A-153(d)(4), these are reasonably related to calculation and audit of the gross-receipts-based fee. They are neither burdensome nor unreasonably exclusionary.

As to the transfer provisions, sound administration of the ordinance requires that the County know in advance the responsibility of those working in its rights-of-way. A given franchise may last up to fifteen years. Section 5A-153(a) (JA 73). Further, a franchise is a personal grant given to a specific entity for a specific purpose. Under these circumstances a transfer provision is normal and facially has no prohibitory effects.

In sum, the provisions of the ordinance that the court found facially burdensome are reasonably related to valid governmental purposes. The legislative judgment of the Council should be respected unless it can be shown that the provisions have a prohibitory effect as applied.

Conclusion

For the reasons set forth above, the decision below should be reversed and the injunction vacated. To the extent the federal claims are dismissed as a matter of law without trial, the pendent state-law claims should also be dismissed under 28 U.S.C. § 1367(c).

Request for Oral Argument

Because the District Judge held invalid an ordinance responding to a Congressional mandate for multiple entry into rights-of-way that affects all the local governments in Maryland and because the basis of court's decision implicates the Fifth and Tenth Amendments to the Constitution and the Commerce and Guaranty Clauses, this Court should hear oral argument. Appellant respectfully submits that the importance and complexity of these issues warrants a minimum of thirty minutes per side.

Respectfully submitted,

Sean D. Wallace
County Attorney
Prince George's County
14741 Governor Oden Bowie Drive
Room 5121
County Administration Building
Upper Marlboro, MD 20772
(301) 952-5237

William Malone

Nicholas P. Miller
William Malone

MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 785-0600

Attorneys for Prince George's County

August, 1999